

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TONI GOLDSMITH)	
Claimant)	
)	
VS.)	
)	
STATE OF KANSAS)	
Respondent)	Docket No. 1,050,744
)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Carrier)	

ORDER

Self-insured respondent requests review of the July 20, 2010 preliminary hearing Order For Compensation entered by Administrative Law Judge Brad E. Avery.

ISSUES

Claimant alleged injury to her left knee as a result of a fall at work. Initially, the respondent denied claimant suffered accidental injury arising out of her employment. But at the conclusion of the preliminary hearing respondent admitted claimant suffered accidental injury arising out of her employment when she fell at work. Respondent then argued claimant was not entitled to either temporary total or temporary partial disability compensation.

The Administrative Law Judge (ALJ) ordered respondent to pay claimant temporary partial disability benefits at the rate of \$181.51 per week and that Dr. Pat Do would provide claimant's medical treatment.

Respondent requests review of whether the ALJ exceeded his jurisdiction in ordering temporary partial disability benefits for a scheduled injury.

Claimant argues the Board does not have jurisdiction to review the issue raised by respondent on an appeal from a preliminary hearing. Claimant further argues the ALJ's Order For Compensation should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant worked approximately four months as a correctional officer as well as working part-time for another employer. On March 27, 2010, claimant was climbing some stairs as part of her job duties for respondent when she tripped and hit her left knee on the stair platform.

Although respondent initially denied claimant had suffered accidental injury arising out of her employment, after hearing claimant's testimony at the preliminary hearing, it was conceded that she suffered accidental injury arising out of and in the course of her employment. The parties further agreed that Dr. Do would be authorized to provide claimant with medical treatment for her injuries.

Because claimant continued to work part-time for her other employer, the respondent argued claimant was not entitled to temporary total disability compensation. And respondent further argued that because she was working for another employer that wage should not be used to calculate temporary partial disability compensation. As previously noted, the ALJ awarded claimant temporary partial disability compensation.

The sole issue raised on appeal by the respondent is whether the ALJ exceeded his jurisdiction in ordering temporary partial disability compensation for a scheduled injury. Respondent did not file a brief with the Board.

K.S.A. 44-534a grants the ALJ authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

The Board's jurisdiction to review preliminary hearing findings is limited to the following issues:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of the worker's employment?
- (3) Did the worker provide the employer with timely notice of the accidental injury and timely written claim for workers compensation benefits?

(4) Has the employer established a defense that defeats the claim?¹

Additionally, the Board is charged with reviewing those preliminary hearing orders where the judge has exceeded his or her jurisdiction or authority in granting or denying the relief requested.² Accordingly, the Board has jurisdiction to review the July 20, 2010 Order For Compensation.

Respondent contends the ALJ exceeded his jurisdiction by awarding claimant temporary partial disability benefits for a scheduled injury. There is no question the ALJ has the authority to entertain an award for temporary partial disability under K.S.A. 44-510e. However, that is only the case if the award is not covered by K.S.A. 44-510d, the scheduled injury statute. Here, the record seems clear that claimant's injuries are covered by K.S.A. 44-510d and, therefore, claimant is precluded from an award of temporary partial disability.

In this case, claimant alleges injury to her left knee. K.S.A. 44-510d(a)(16) addresses the loss of a leg.³ And subsection (b) of that same statute states:

Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same **shall be exclusive** of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, **and no additional compensation shall** be allowable or payable **for any temporary** or permanent, partial or total disability . . . (Emphasis added.)

Respondent contends that K.S.A. 44-510d makes it clear that temporary partial disability compensation is not to be awarded in scheduled injury cases. This Board Member agrees. This position is further supported by the language in K.S.A. 44-510e that specifically provides for temporary partial disability compensation only in cases of "temporary or permanent partial general disability not covered by such schedule." K.S.A. 44-510e also contains the language or formula for calculating temporary partial disability compensation. No such language appears in K.S.A. 44-510d, the "scheduled injury" statute.

¹ K.S.A. 44-534a(a)(2).

² K.S.A. 2009 Supp. 44-551(i)(2)(A).

³ K.A.R. 51-7-8(c)(4) provides that for if an injury is at a joint on a scheduled member then the loss shall be considered to the next higher schedule. Consequently, a scheduled knee injury is considered a loss to the leg.

Where a statute is clear and unambiguous, the court must give effect to the legislative intent expressed therein rather than make a determination of what the law should or should not be.⁴

As claimant's right to compensation is controlled by K.S.A. 44-510d, claimant is not entitled to receive temporary partial disability compensation. It may be that as this claim develops, claimant's disability will extend beyond her knee. But as of now, that is not the case. This Board Member finds the ALJ did exceed his jurisdiction in ordering temporary partial disability compensation for a scheduled injury.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, it is the finding of this Board Member that the Order For Compensation of Administrative Law Judge Brad E. Avery dated July 20, 2010, awarding claimant temporary partial disability compensation is reversed, in part.

IT IS SO ORDERED.

Dated this _____ day of September 2010.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent
Brad E. Avery, Administrative Law Judge

⁴ *Bergstrom v. Spears Manufacturing Company*, 289 Kan. 605, 214 P.3d 676 (2009).

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2009 Supp. 44-555c(k).